

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS, and EDWARD WILLIAMS,

Plaintiffs,

v.

ORDER
05-CV-836S

BEEMILLER, INC. d/b/a HI-POINT,
CHARLES BROWN, MKS SUPPLY, INC.,
INTERNATIONAL GUN-A-RAMA,
KIMBERLY UPSHAW, JAMES NIGEL BOSTIC,
CORNELL CALDWELL, and JOHN DOE
TRAFFICKERS 1-10,

Defendants.

1. Presently before this Court is the Report and Recommendation of the Honorable Leslie G. Foschio, United States Magistrate Judge, recommending that Plaintiffs' Motion to Remand to State Court be granted and also that Plaintiffs be awarded costs and attorneys' fees. (Docket No. 55.) For the reasons discussed below, this Court adopts Judge Foschio's Report and Recommendation in its entirety including the authorities cited and the reasons given therein.

2. On August 16, 2003, while playing basketball in front of a neighbor's house, Plaintiff Daniel Williams was shot in the stomach by Defendant Cornell Caldwell. Caldwell fled the scene, but was apprehended within minutes. Caldwell eventually pled guilty to first degree assault, for which he is currently serving a term of incarceration at Green Correctional Facility in Caxsackie, New York.

2. On July 28, 2005, Plaintiffs Daniel and Edward Williams (Daniel's father) commenced this civil action in the Supreme Court for the State of New York, Erie County,

alleging five separate claims against the named Defendants for injuries sustained as a result of the shooting. Defendants Beemiller and Brown removed the action to this Court, arguing this Court has subject matter jurisdiction by reason of diversity of citizenship pursuant to 28 U.S.C. § 1332(a). Defendants MKS and Gun-A-Rama filed written consents to the removal. Thereafter, Plaintiffs filed a Motion to Remand to State Court, and also sought recovery of the costs and fees incurred as a result of Defendants' removal. (Docket No. 16.)

3. This Court referred the case to Judge Foschio for all non-dispositive pretrial matters pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket No. 19.) Finding that a motion for remand was not dispositive, Judge Foschio entered a decision and order on June 29, 2006, granting Plaintiffs' motion for remand. (Docket No. 31.) Judge Foschio also held that Plaintiffs were entitled to costs and attorneys' fees. (Id.) In response to Judge Foschio's decision and order, Defendants timely submitted objections. Defendants also argued that this Court should treat Judge Foschio's decision as a report and recommendation and review the decision and order *de novo*.

4. This Court denied Defendants' objections, and affirmed Judge Foschio's decision and order after finding that it was neither clearly erroneous nor contrary to law. (Docket No. 41.) But after an appeal by Defendants, the United States Court of Appeals for the Second Circuit vacated this Court's Order and remanded the matter. (Docket No. 53.) The Second Circuit held that a motion for remand is not a "pretrial matter," and therefore, "a magistrate judge presented with such a motion [for remand] should provide a report and recommendation []". (Id., p. 256.)

5. As a result of the Second Circuit's mandate, this Court referred Plaintiffs' Motion for Remand to Judge Foschio for the issuance of a report and recommendation. (Docket No. 54.) On October 31, 2008, Judge Foschio filed a Report and Recommendation recommending that Plaintiffs' motion be granted, and also that Plaintiffs be awarded costs and attorneys' fees. (Docket No. 55.) Defendants timely filed objections. (Docket No. 56.)

6. This Court has thoroughly reviewed *de novo* Judge Foschio's Report and Recommendation, the Defendants' Objections thereto, and the applicable law. Upon due consideration, this Court finds no legal or factual error in Judge Foschio's Report and Recommendation, and it concurs in his conclusions. Accordingly, Defendants' Objections are denied and this Court will accept Judge Foschio's Report and Recommendation in its entirety.

IT HEREBY IS ORDERED, that this Court accepts Judge Foschio's Report and Recommendation (Docket No. 55) in its entirety, including the authorities cited and the reasons given therein.

FURTHER, that Defendants' Objections to the Report & Recommendation (Docket No. 56) are DENIED.

FURTHER, that Plaintiffs' Motion to Remand to State Court (Docket No. 16) is GRANTED.

FURTHER, that the Clerk of the Court is directed to remand this case to the New York State Supreme Court, County of Erie.

FURTHER, that Plaintiffs' Motion for Attorneys' Fees and Costs (Docket No. 16) is GRANTED.

FURTHER, that Plaintiffs shall file an affidavit describing the attorneys' fees and costs incurred in connection with Plaintiffs' motion by July 9, 2009.

SO ORDERED.

Dated: June 22, 2009
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge